

Supreme Court, U.S.
FILED

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MICHAEL ROZAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

79-806

VICTOR W. DUNGAN - - - Petitioner

versus

KENTUCKY BAR ASSOCIATION - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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VICTOR W. DUNGAN - - - - - Petitioner

v.

KENTUCKY BAR ASSOCIATION - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner, Victor W. Dungan, respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in the above entitled case on August 21, 1979, by the Supreme Court of Kentucky.

OPINION BELOW

The opinion of the Supreme Court of Kentucky dated August 21, 1979 is reported at 586 S. W. 2d 15. The opinion and recommendation of the Board of Governors of the Kentucky Bar Association is in the Appendix at pages 17-26.

JURISDICTION

The petitioner, a licensed practicing attorney in Kentucky was charged by the Kentucky Bar Association with two counts of unprofessional conduct follow-

ing an evidentiary hearing before a trial committee of one commissioner and an *in camera* proceeding before the Board of Governors. The Supreme Court of Kentucky made its own fact finding and conclusions and ordered that petitioner be permanently disbarred from the practice of Law in Kentucky.

A timely petition for rehearing was denied by the Supreme Court of Kentucky without opinion.

This petition for a writ of certiorari is being filed within 90 days after that order. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Since the Board of Governors decision can be final, should it not provide a due process hearing and allow for oral argument before it, to urge a result of not guilty or for a private reprimand if found guilty?
2. If the Supreme Court of Kentucky's decision is done on the basis of a *De Novo* consideration of the pleadings and trial record, must it provide a due process evidentiary hearing and oral argument?
3. Has the Bar Association met the burden of proof and should the standard of proof be higher than the "substantial evidence" standard of RAP 3.330?
4. Where the Supreme Court of Kentucky is the Court of original jurisdiction, is it a denial of equal protection and due process to deny the right of appeal to attorneys although every other class of litigants is permitted an appeal as a right?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 14th Amendment, §1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Rules RAP:

"Rule 3.170—PROCESSING DISCIPLINARY CASES

"Upon the expiration of fifteen days, or receipt of response, the Director shall refer the matter together with such investigative evidence as may have been obtained, to the Tribunal to determine whether the complaint should be dismissed or file a charge."

"Rule 3.330—ORDER OF PROCEEDINGS AND BURDEN OF PROOF

"The Trial Commissioner shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Commissioner the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by substantial

evidence. In reinstatement hearings the burden shall rest upon the applicant. Before submission the Trial Commissioner may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Commissioner there shall be no further oral argument or briefing either before the Trial Commissioner or before the Board."

"Rule 3.360—TRIAL COMMISSIONER TO FILE REPORT WITH BOARD

"When a disciplinary proceeding has been finally submitted, the Trial Commissioner shall promptly file with the Board within thirty (30) days after the transcript of evidence is filed by the reporter with the Director the entire transcript of the proceeding, the transcript of testimony together with such papers as may have been filed and a written report in the nature of findings of fact relating to guilt or innocence, which shall contain a concise statement of:

- (a) the charges made against and the defense offered by the respondent;
- (b) the proceedings had;
- (c) the facts which the Commissioner deems proven by substantial evidence.

The Trial Commissioner's report shall constitute a part of the record in the case. The report shall be advisory. Within forty (40) days after the filing of the report with the Director, each party shall file a brief simultaneously with the Director and no reply briefs shall be permitted."

"Rule 3.370—BOARD'S ACTION ON TRIAL COMMISSIONER'S REPORT AND PROCEDURE IN THE COURT

"(1) Upon receipt of the report of the Trial Commissioner, the Board shall promptly consider and act upon the entire record. Only the President, the President-Elect, the Vice-President and the fourteen duly elected members of the Board from their respective Supreme Court districts shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the Board under this Rule, or has been challenged on grounds sufficient to disqualify a circuit judge shall be disqualified; and the Chief Justice shall appoint a member to consider and act on the case.

"(2) Nine of those qualified to sit in a disciplinary matter must be present to constitute a quorum for consideration of such matters.

"(3) The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found guilty, the Board shall then decide by a roll call vote, the disciplinary action. Both the findings and any disciplinary action must be agreed upon by 9 or $\frac{3}{4}$ of the members of the Board present and voting in the proceedings, whichever is less. The result of each of the two votes shall be recorded in the Board's minutes, together with decisions of the Board giving its findings of fact and conclusions of law and reasons therefor as stated in paragraph (4) to this Rule. The President shall sign and file with the Director an order setting forth the action and decision of the Board, and the Director shall mail copies of such order and decision together with a copy of the

Trial Commissioner's report, to the parties or their counsel and to each member of the Tribunal.

"(4) The Board will, in its decision, state wherein it differs with the findings of fact of the Trial Commissioner, and will state the discipline, if any.

"(5) The entire record, together with a certified bill for costs and expenses incurred in the investigation preliminary to, and in the conduct of, the proceedings, shall be filed with the Clerk by the Director.

"(6) The respondent may file a notice for the Court to review the Board's decision within thirty (30) days after the Board's decision is filed with the Clerk stating reasons for review accompanied by a brief supporting his position on the merits of the case. The Director may file a brief within thirty (30) days thereafter in support of the Board's decision. Before the notice for review can be filed, the respondent shall furnish a bond with surety acceptable to the Clerk, conditioned that if the principal in the bond be disciplined by the Court, he will promptly pay all costs incurred in the proceeding including those certified under Rule 3.370. If he files his response *in forma pauperis*, no bond shall be required.

"(7) The Court may within forty (40) days of the filing of the Board's decision notify both the Director and respondent that it will review the Board's decision. If the Court so acts, the Director and respondent may each file briefs within forty (40) days with no right to file reply briefs unless by order of the Court whereupon the case shall stand submitted. Thereafter the Court shall

enter such orders or opinion as it deems appropriate on the entire record.

"(8) If the respondent does not file a notice of review or the Court does not notify the parties of its review under paragraph (7) of this Rule, the Court shall enter an order adopting the decision of the Board relating to all matters.

"(9) When the respondent is proceeded against by warning order, the notice in paragraph (3) and paragraph (7) of this Rule shall be deemed to have been served thirty (30) days after the date of the making of the warning order."

STATEMENT OF THE CASE

The Petitioner, Dungan, was appointed by the court as a public defender to represent Richard Krueger. Mr. Krueger's mother called on the Petitioner at his office and advised him of the appointment and discussed the case with him. Mrs. Krueger had in her possession two \$1,000.00 cashiers checks. The testimony was that she had been to both banks in Shepherdsville and nobody would cash a check. Dungan called his bank in Louisville regarding the check. She testified that Mr. Dungan took the entire \$1,000.00 and from it he paid \$159.00 in fine, returned \$141.00 to her and retained \$700.00 as an attorney fee. Mr. Dungan testified that he deposited the \$1,000.00 check in his escrow account and refunded \$700.00 to Mrs. Krueger in cash. Mr. Dungan maintained two separate accounts; a business account and an escrow account. The proof showed that if he had been paid a fee he would

have deposited the \$700.00 in his business account. He then paid Mr. Krueger's fine and court costs (\$159.00) out of the remaining \$300.00 and refunded to Mrs. Krueger \$141.00. He wrote a check to himself out of the escrow account for \$700.00 as a refund of the money he had paid Mrs. Krueger out of his pocket. On that check is noted "Refund of Personal Funds".

That notation was on that check before Mr. Dungan could have had any idea that this woman was going to make a complaint against him. After Mrs. Krueger came into his office with the money, Mr. Dungan went to see the Judge who would hear the case.

Mr. Dungan's secretary likewise testified regarding the fact that Mrs. Krueger could not get the check cashed. She heard him counting the money and saw it lying on his desk.

During the hearing on Richard Krueger's case, Petitioner advised the Court that he had \$300.00 of Mrs. Krueger's money. He also moved the Court to remove him as public defender as Mrs. Krueger had at least \$1,000.00 with her and thus did not qualify for a public defender. Mrs. Krueger testified that she had \$2,000.00 with her. The motion for removal as a public defender was overruled.

A complaint was made against Petitioner by Mrs. Krueger even before the hearing on her son's case, although the formal charge was not brought until shortly after the hearing. Mr. Dungan's case was referred to the Grand Jury which heard the same testimony heard by the trial commissioner. The Grand Jury refused to indict Petitioner.

This complaint was then filed before the Kentucky Bar Association. An evidentiary hearing was conducted before one trial commissioner appointed by the Bar Association at which two totally different versions of the events were given. The trial commissioner elected not to believe Petitioner.

The Board of Governors met *in camera* and reviewed the case on the record and ruled on February 22, 1979 that Petitioner be permanently disbarred from the practice of law in Kentucky.

In a *per curiam* opinion the Supreme Court of Kentucky adopted that recommendation.

REASONS FOR GRANTING THE WRIT

In Re Ruffalo, 390 U. S. 544 (1968) establishes that disciplinary proceedings of an attorney are "adversary proceedings of a quasi-criminal nature." Long ago this Court recognized the 14th Amendment principle that a disbarment order arising from such a quasi-criminal proceeding cannot stand if "the State procedure, from want of notice or opportunity to be heard was wanting in due process." *Sellings v. Radford*, 243 U. S. 46, 51 (1917). The petitioner is thus justified invoking the certiorari powers of this Court to reject a state disbarment order which presents important procedure principals under the 14th Amendment. No prior Supreme Court decision has focused on these two questions created by the procedures employed in Kentucky.

I. Since the Board of Governor's Decision Can Be Final, Should It Not Provide a Due Process Hearing and Allow for Oral Argument Before It to Urge a Result of Not Guilty Or for a Private Reprimand If Found Guilty?

The Board of Governor's recommended that Petitioner be permanently disbarred from the practice of law in Kentucky. Had they determined that he was not guilty or that even though guilty he should have been given a private reprimand, their decision would have been final.

Under these circumstances, he would have been denied all due process protection before the Board that could make a final determination. There is no opportunity to submit a written brief or to make an oral argument. The fact that the Board of Governor's determination was such that their action was not final in this particular case does not change the fact that an attorney is entitled to due process. He is entitled to be heard before the Board. See: *Southern Railway Co. v. Virginia*, 290 U. S. 190 (1933).

At this stage of the proceeding, due process protection must be provided in the Kentucky procedure. As early as 1908, this Court in *Londoner v. Denver*, 210 U. S. 373, 386 stated:

“But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal.”

It is the obligation of the Board of Governors, if they retain the authority to finalize, to consider the evi-

dence or argument for “the one who decides must hear.” *Morgan v. U. S.*, 298 U. S. 468, 481 (1936). At the very least, due process requires an oral argument. In *F.C.C. v. WJR*, 337 U. S. 265, 276 (1949), this Court stated “the right of oral argument as a matter of procedural due process varies case to case in accordance with differing circumstance.” Disciplinary proceedings are “quasi-criminal” *In Re Ruffalo, supra*.

The Petitioner submits that disbarment is so severe a penalty when pertaining to a lawyer's career that due process requires the right to be heard orally before any body with the power to make a final disposition. *Herring v. New York*, 422 N. S. 853 (1975), reaffirms “the adversary system's commitment to argument” in a criminal case and should be applicable to a “quasi-criminal” disbarment action.

II. If the Supreme Court Decision Is Done On the Basis of a *De Novo* Consideration of the Pleadings and Trial Record Must It Provide a Due Process Evidentiary Hearing and Oral Argument?

The Supreme Court of Kentucky in *Kentucky Bar Association v. Stivers*, Ky., 475 S. W. 2d 900, 903-904 (1971), stated:

“In any event, the report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this Court (RAP 3.360, 3.370). This means of course, that in the end this court must be judge of the factual as well as the legal issues and of the final action to be taken. The role of fact-

finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding.

"In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory, which means in simple English that the members of this court are going to exercise their own judgment anyway."

and reinforced in *Kentucky Bar Association v. Collis*, Ky., 535 S. W. 2d 95 (1975), cert. denied, 46 L. Ed. 637.

Thus, the Court is acting as a *de novo* fact-finder. If the Court is going to take on "the role of fact-finder" and relegate the fact-finding function of the trial committee and the recommendations of the Board of Governors to "hortatory", then due process protections as discussed relating to the Board of Governors applies to the court.

This Court's decision in *Willner v. Committee on Character*, 373 U. S. 96 (1963), on admission to the bar action, the New York Supreme Court relied on a report of a committee which failed to hold a hearing with due process protections as a basis for rejecting the application.

III. Has the Bar Association Met the Burden of Proof and Should the Standard of Proof Be "Beyond a Reasonable Doubt" Rather Than the "Substantial Evidence" Standard of RAP 3.330?

RAP states *inter alia* that the burden of proof is on the Association and that burden is met by "substantial evidence."

The test in criminal cases is "beyond a reasonable doubt." In a juvenile delinquency proceeding, *In Re Winship*, 397 U. S. 358, 359, n. 1 (1970), this Court struck down a preponderance of evidence standard and requested that the Standard be one of reasonable doubt.

In deportation hearings, although non-criminal, this Court required that the proof be "unequivocal and convincing evidence" where the proceedings have a grave impact upon the lives of human beings. *Woody v. Immigration and Naturalization Service*, 385 U. S. 276, 285 (1966).

The facts in this case demonstrate how the standard of proof was critical. *The grand jury heard the same testimony, yet refused to indict.* And there the standard was less than reasonable doubt. The testimony on both sides was directly contradictory. Yet the Association chose to believe a disgruntled client over a licensed member of the bar.

Who is to say what the vote would have been if the Standard had been higher. The loss of one's life profession is as a severe a loss of freedom as a prison sentence.

IV. Where the Supreme Court of Kentucky Is the Court of Original Jurisdiction, Is It a Denial of Equal Protection and Due Process to Deny the Right of Appeal to Attorneys Although Every Other Litigant in Kentucky Is Permitted an Appeal as of Right?

In Kentucky, the State Legislature has provided that all litigants-criminal and civil (*other than attorneys*) charged in disciplinary proceedings, have at least one appeal as right from the decision of the trier of fact. There is no dispute that the Supreme Court of Kentucky is the trier of fact. In *Kentucky Bar Association v. Stivers, supra*, at page 904, the Court stated:

"In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory which means in simple English that the members of this Court are going to exercise their own judgment anyway."

This view was reaffirmed by *Kentucky Bar Association v. Franklin*, at page 463, where the court said:

"A final decision of guilt can be made only by this Court and it is done on the basis of a *de novo* consideration of the pleadings and the trial record."

The Supreme Court of Kentucky does not sit or review the report and recommendations of the Board of Governors as an appellate tribunal. After the Board has made its determination, the entire record, including the recommendations, is filed with the Supreme Court of Kentucky, RAP 3.370, and a rule is issued for the attorney "to show cause why he should not be

adjudged guilty of unprofessional conduct and disciplined therefor". RAP 3.410.

This Court has held that once a State Legislature provides for an appellate process, it may not deny an appeal to a selected class of litigants on an arbitrary or capricious basis.

"When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U. S. 56, 77 (1972).

The denial of appeal in disciplinary proceedings are not in the same class as ordinary civil or criminal litigants. Even if that were true, equal protection would still be denied, for the state gives to all Kentucky professionals, *except attorneys*, the right of at least one judicial review of disciplinary determination against them; and, the scope of the review embraces all questions of law and fact, including the substantiality of the evidence.

CONCLUSION

Thus it is clear that at both the administrative and judicial level due process was lacking and that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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*Counsel for Petitioner,
Victor W. Dungan*

APPENDIX

RENDERED: JULY 3, 1979

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - - - *Complainant*

v.

VICTOR W. DUNGAN - - - - - *Respondent*

OPINION

Rehearing Denied August 21, 1979

In disciplinary proceedings, the Supreme Court held that charging a fee for representing an indigent defendant, failing to return \$700 of \$1,000 given by the indigent defendant's mother, and testifying falsely at a preliminary hearing as to retention of only \$300 to pay possible fines and costs warrants disbarment.

Disbarment ordered.

Attorney and Client, Key 38

Charging a fee for representing an indigent defendant, failing to return \$700 of \$1,000 given by the indigent defendant's mother, and testifying falsely at a preliminary hearing as to retention of only \$300 to pay possible fines and costs warrants disbarment. KRS 31.250; ABA Code of Professional Responsibility, DR1-102(A)(3-6), DR2-106 (A), DR7-102(A)(5).

Leslie G. Whitmer, Director, Michael M. Hooper, Asst. Director, Kentucky Bar Association, Frankfort, for complainant.

John Tim McCall, Louisville, for respondent.

PER CURIAM.

The factual context for this disciplinary proceeding against Victor W. Dungan, a licensed attorney of the Kentucky Bar, is as follows.

On August 15, 1977, Dungan was visited in his law office by Mrs. Antonia Krueger, who informed Dungan that he had been appointed public defender for her son, Richard Krueger, who was facing two criminal charges in Bullitt County Court. Mrs. Krueger had in her possession a cashier's check in the amount of \$1,000.

According to Mrs. Krueger, Dungan took the check, keeping \$500 as an attorney's fee and the balance to defray anticipated court costs. Dungan, on the other hand, maintains that he retained \$300 for potential court costs and returned \$700 in cash (which he had on hand following a vacation) to Mrs. Krueger. In any event, Dungan deposited the check in his escrow account that day.

Dungan represented Richard Krueger at a preliminary hearing around noon the following day (August 16), during which he informed the court that Mrs. Krueger had deposited \$300 with him to cover fines and costs. County Attorney Chester Porter represented the Commonwealth. Richard was fined and his sentence suspended. At the close of the hearing Dungan moved to be removed as public defender in order to be retained as counsel. Bullitt County Judge Arson Moore denied the motion on the grounds that the case had already been disposed of. Dungan paid the fine and court costs amounting to \$159 with a check (No. 233) from his escrow account and wrote Mrs. Krueger a check (No. 234) for \$141. Dungan wrote a third check (No. 235) from the escrow account to himself for \$700, with the notation "refund of personal funds." That check, dated August 15, was not deposited until August 22.

Based on information given by Mrs. Krueger to Judge Moore and County Attorney Porter prior to the preliminary hearing, Mrs. Krueger signed a warrant (prepared by Porter) against Dungan on the afternoon of August 16 for violation of KRS 31.250, which prohibits charging a fee while representing an indigent defendant. The Bullitt

County Grand Jury, however, did not return an indictment against Dungan for the offense.

Dungan was subsequently charged by the Inquiry Tribunal on two counts of engaging in unethical and unprofessional conduct. Count I charged that Dungan had been appointed public defender for Richard Krueger, that he charged a \$500 attorney's fee, and that he failed to return \$700 of the \$1,000 given to him by Mrs. Krueger. (DR 1-102(A)(3-6); DR 2-106(A)). Count II charged that during the preliminary hearing Dungan falsely stated to the court that he had retained only \$300 from Mrs. Krueger to pay possible fines and costs (DR 7-102(A)(5)).

The trial commissioner, after a hearing, made findings of fact that Dungan did not return the \$700 and that he made a false statement to the Bullitt County Court and found Dungan guilty on both counts.

Having reviewed the record, this court is of the opinion that the findings and conclusions of the trial commissioner and the Board of Governors are supported by a preponderance of the evidence and that the unanimous recommendation of permanent disbarment should be adopted. It is significant that Dungan failed to produce a receipt from Mrs. Krueger for a cash transaction involving an amount as large as \$700. In addition, Dungan deposited Mrs. Krueger's check in his escrow account on August 15, the same date he allegedly wrote a \$700 escrow check to himself to refund the cash he had given Mrs. Krueger earlier. The latter check was not deposited until August 22, however, and Dungan's explanation that he carried it in his wallet for a week stretches credibility. And, unlike Dungan, Mrs. Krueger had no reason to fabricate her story.

The respondent, Victor M. Dungan, is disbarred from the practice of law in this Commonwealth, and ordered to pay the costs incurred in this proceeding as directed by SCR 3.450. The respondent shall comply with the provision of SCR 3.390.

All concur.

**MINUTES AND CERTIFICATION OF PROCEEDING
BY BOARD OF GOVERNORS
KENTUCKY BAR ASSOCIATION**

IN RE: VICTOR W. DUNGAN

I, B. M. Westberry, President, do certify:

This cause came on for consideration by the Board of Governors of the Kentucky Bar Association, 15 members entitled to vote on disciplinary matters being present, and all other persons and staff absent from the room.

The record of the case was physically present.

On motion made and seconded, the report of the Trial Commissioner was received.

The case was discussed, the discussion being confined to the record.

After full consideration, a roll call vote was taken on the issue of guilt or innocence. The result:

Guilty	15
Not Guilty	0
Abstaining	0

After discussion was held on the appropriate punishment, a roll call vote was held with a majority of 15 recommending to the Supreme Court of Kentucky that the respondent, Victor W. Dungan, be permanently disbarred and required to pay the costs in this action.

Pursuant to SCR 3.370, a written decision of the Board was ordered to be filed with the Director.

This certificate and minutes of proceeding, after being inspected by each member voting, are made a part of the record in this case and the minutes of the Association.

This 20th day of January, 1979.

(s) B. M. Westberry, President

ATTEST:

(s) Leslie G. Whitmer, Director

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION - - - - - *Complainant*
v.

VICTOR W. DUNGAN - - - - - *Respondent*

TRIAL COMMISSIONER'S REPORT

Comes now the Trial Commissioner, William R. Forester, of Harlan, Kentucky, and states that he was appointed Trial Commissioner in the above captioned matter on January 30, 1978, and that a hearing was held on this matter at Louisville, Kentucky, on April 27, 1978, and that, at that hearing the following persons were present and/or represented by counsel, to-wit:

- (1) Kentucky Bar Association: Represented by
 Honorable Bruce R. Hamilton
 Commonwealth Attorney
 La Grange, Kentucky
 Honorable Michael M. Hooper
 Assistant Director
 Kentucky Bar Association
- (2) Respondent, Victor W. Dungan, was present in person and represented by
 Honorable John Tim McCall, Counsel

**STATEMENT OF CHARGES
COUNT I**

That the Respondent, Victor W. Dungan, violated the Code of Professional Responsibility:

- (a) *Disciplinary Rule 1-102A, Sub 3*
 "(3) Engage in illegal conduct, involving moral turpitude;

- "(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- "(5) Engage in conduct that is prejudicial to the administration of justice;
- "(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

(b) *2-106 (A)*

"A lawyer shall not enter into an agreement or charge, or collect an illegal or a clearly excessive fee."

COUNT II

Count II involves disciplinary rule 7-102 (5):

"Knowingly make a false statement of law or fact."

COUNT I

This Count charges the Respondent, Victor W. Dungan, while a member of the Public Defender System in Bullitt County, was appointed as a Public Defender to represent one Richard Krueger, in the Bullitt Quarterly Court and, while under such appointment, he obtained some \$700.00 as attorney's fee from Mrs. Antonia Krueger.

COUNT II

Count II is that the Respondent, Victor W. Dungan, falsely told the Bullitt Quarterly Court Judge, Honorable Arson Moore, that he had received \$300.00 from Mrs. Antonia Krueger to pay for a possible bond and/or fine.

STATEMENT OF DEFENSES

The Respondent's response to Count I was that he had obtained a \$1,000.00 check from Mrs. Antonia Krueger and had cashed the check for her, keeping \$300.00 for the approximate fines and court costs and returning to her the \$700.00 in cash, from his pocket.

The defense to Count II was that Respondent did not give false information to Judge Arson Moore but had, in

fact only received \$300.00 from Mrs. Antonia Krueger to pay the prospective fines and/or court costs emanating from the charges against Richard Krueger.

STATEMENT OF THE PROCEEDINGS

The proceedings are well documented in the Transcript of the proceedings, to-wit:

(1) Each party was asked if they could stipulate as to the precise nature of the charges and they were in agreement that the charges were essentially as set out in the "Statement of the Charges", supra.

(2) The burden of proof was on the Kentucky Bar Association and, after counsel for Kentucky Bar Association and Respondent, Victor W. Dungan had made their opening statements, the Kentucky Bar Association introduced its evidence in chief. Thereafter the Respondent, through his attorney, Honorable John Tim McCall, introduced his evidence in chief, with the order of witnesses being waived so that the Respondent, Victor W. Dungan, was the last witness to testify so that his other witnesses could leave early.

The hearing took approximately eight and one-half hours.

At the conclusion, the parties were asked if they desired to make closing statements and Mr. Hamilton made a closing statement on behalf of the Kentucky Bar Association and Mr. McCall made a closing statement on behalf of the Respondent, Mr. Victor W. Dungan.

At the conclusion, each of the parties was offered an opportunity to submit any supplemental position papers prior to the rendering of a decision by the Trial Commissioner and each declined that opportunity.

Thereafter, the hearing was adjourned.

STATEMENT OF FINDINGS OF FACT

The Trial Commissioner feels that the preponderance of the evidence establishes the following facts, and he so finds:

(1) That the Respondent, Victor W. Dungan, was appointed as a Public Defender for one Richard P. Krueger on or about August 14, 1977.

(2) That on or about August 15, 1977, he was advised of his appointment under the Public Defender System. (See Bar Exhibit 6.)

(3) That on or about August 15, 1977, the Respondent, Victor W. Dungan, obtained from Mrs. Antonia Krueger a cashier's check in the amount of \$1,000.00 as attorney's fees and allowances for fines and/or court costs against the said Richard P. Krueger.

(4) That he did not return the \$700.00, the basis of his defense, to the said Antonia Krueger, but that this Cashier's Check in the amount of \$1,000.00 was deposited to the account of Mr. Victor W. Dungan on August 15, 1977, and that on or about August 22, 1977, a \$700.00 check, payable to Mr. Dungan, cleared the Louisville Trust Company bank account of Mr. Dungan, although the check had been written August 15, 1977. (See Bar Exhibits 3-B, number 4 and number 5.)

(5) The Trial Commissioner also finds that the said Victor W. Dungan falsely advised the Judge of the Bullitt Quarterly Court that he had received only \$300.00 from Mrs. Antonia Krueger, when he had, in fact, received \$1,000.00 and had paid fines and court costs of \$159.00 and paid Mrs. Antonia Krueger the sum of \$141.00, for a total of \$300.00. This left an attorney's fee of \$700.00.

Dated this 9th day of June, 1978.

(s) William R. Forester
Trial Commissioner
Kentucky Bar Association
Forester Building
Harlan, Kentucky 40831

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION

Complainant

v.

VICTOR W. DUNGAN

Respondent

CHARGE

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that Respondent Victor W. Dungan, whose last known address is Maryville Office Building, 5019 Maryville Drive, Louisville, Kentucky, a member of said association, did engage in the following unprofessional and unethical conduct:

I

On or about August 15, 1977, Respondent was appointed by the Bullitt County Judge as a public defender to represent one Richard P. Krueger in the case of *Commonwealth v. Krueger*, Bullitt County Court, #40992B. On August 15, 1977, Krueger's mother, Antonia Krueger, whose last known address is 721 E. 155th Street, Cleveland, Ohio, came to Respondent's office after being informed that Respondent was appointed to represent her son. Mrs. Krueger endorsed a \$1,000 cashier's check and gave same to Respondent who was claiming a \$500 attorney fee and the remainder to be applied to a possible fine and court costs. At the conclusion of the said criminal proceedings on August 16, 1977, Respondent paid by check from his escrow account court costs and fine totalling \$159 and a refund to Mrs. Krueger of \$141. Respondent also issued to himself a check for \$700 and failed to refund any part of said \$700 to Mrs. Krueger.

II

Within the same facts and circumstances of Count I above, and during the hearing of *Commonwealth v. Krueger*, Respondent falsely told the court that he had received \$300 from Mrs. Krueger to pay for a possible bond and/or a fine. At the end of the said hearing Respondent moved the court to be relieved of his appointment as public defender and proceed as private counsel.

WHEREFORE, Complainant charges that such actions by Respondent constitute unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to Respondent in accordance with RAP 3.380.

Kentucky Bar Association
By: (s) Herbert D. Sledd
Member
Inquiry Tribunal

ATTEST:

(s) Leslie G. Whitmer, Director
Kentucky Bar Association